Petition

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-183

IN THE UNITED STATES SUPREME COURT

October, 1981 Term

MAGMA COPPER COMPANY, Petitioner, vs. SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, and FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION, Respondents, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Intervenor.	)	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 79-7687 ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

UNDER SECTION 103(f) OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, MUST A MINE OPERATOR COMPENSATE MORE THAN ONE MINER FOR TIME SPENT ACCOMPANYING INSPECTORS ON AN INSPECTION OF A MINE?

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OPINION BELOW

The Opinion of Administrative Law Judge Michael Lasher dated March 8, 1979 (Appendix A, infra., pp. A-1 through A-8) is reported in 1979 Decisions of the Federal Mine Safety and Health Review Commission (March), page 81. The Opinion of the Federal Mine Safety and Health Review Commission, sitting en banc, dated December 10, 1979 (Appendix B, infra., pp. B-1 through B-6) is reported in 1979 Decisions of the Federal Mine Safety and Health Review Commission (December), page 1948. The Decision of the Ninth Circuit Court of Appeals (Appendix C, infra., pp. C-1 through C-6) is reported at 645 F.2d 694 (9th Cir. 1981).

STATEMENT OF THE CASE

A citation was issued by Respondent Mine Safety and Health Administration ("MSHA") against Petitioner on July 26, 1978 alleging a violation of §103(f) of the Federal Mine Safety and Health Act of 1977, in that Petitioner would not assure Respondent MSHA that two Representatives of Miners would be paid by Petitioner for time spent assisting the Inspectors during the inspection. Respondent MSHA also issued Petitioner a §107(a) withdrawal order for the same alleged violation.

On July 31, 1978, Petitioner filed an Application for Review of the citation and withdrawal order with the office of Administrative Law Judges, Federal Mine Safety and Health Review Commission. A hearing was held before Administrative Law Judge Michael Lasher on November 13, 1978. On March 8, 1978, Judge Lasher vacated the citation and withdrawal order, holding that only one Representative of Miners was required to be paid by a mine operator during a regular inspection.

Respondents MSHA and the United Steelworkers of America appealed the case to the entire Review Commission on April 4, 1979, and on April 11, 1979, the Review Commission directed review. Oral arguments were held before the Review Commission on July 31, 1979. On December 10, 1979, the Review Commission set aside the Administrative Law Judge's Decision.

Petitioner filed a Petition for Review to the United States Court of Appeals for the Ninth Circuit on December 20, 1979. On May 18, 1981, the Ninth Circuit Court of Appeals issued a Decision upholding the Federal Mine Safety and Health Review Commission. The Petitioner's Petition for Rehearing was denied on June 22, 1981.

STATEMENT OF FACTS

On July 26, 1978, MSHA Inspectors Chester Pascoe and Thomas Aldrete traveled from Tucson, Arizona to San Manuel, Arizona to conduct an inspection of Magma Copper Company's San Manuel Mill. The Mill is a functionally integrated operation, a fact which the Secretary recognized long ago in the assignment of one identification number for the whole milling process. The Inspectors rode to the site in the same car and coordinated the planned inspection on the way to the site. When they arrived at the Mill, the conversation was recalled by Inspector Pascoe as follows:

> "Q: Could you tell us what you did in the mine safety office? Between 10:20 and 11:40?"
>
> "A: Yes, we discussed the fact that we was (sic) going to continue our inspection and at that time we would like a miners' representative to accompany each inspector." (emphasis added)
> (Transcript of hearing, p. 36)

At the time of their arrival in San Manuel, they conferred with Mr. Horace Carter, the

Company's Assistant Director of Safety, and requested that two Representatives of Miners be appointed to accompany them. Upon being provided a list of the employees of Magma Copper Company who were designated as Representatives of Miners, Mr. Carter informed Mr. Pascoe that two Representatives would be provided and that pursuant to Section 103(f) of the Act, only one would be provided without loss of pay. Mr. Pascoe then issued a citation to Mr. Carter and gave him until after lunchtime to abate it. The citation read as follows:

> "A representative of miners was not given the opportunity to accompany an authorized representative of the Secretary of Labor on the safety and health inspection. The Company allowed a representative of miners to accompany one MSHA inspector on the inspection, but refused to allow a representative of miners to accompany a second (sic) MSHA inspector on the same property (same I.D. No.) without suffering loss of pay. The intent was to form two (2) parties to expedite the inspection."

Mr. Pascoe set an abatement date of 12:30 p.m. on the same date. When Mr. Aldrete and Mr. Pascoe returned from lunch at 12:30 p.m.,

Mr. Carter informed them again that although two Representatives of Miners would be provided during the inspection, only one would suffer no loss in pay. At that time, Mr. Pascoe issued an order which provided as follows:

> "Mr. Horace A. Carter, Assistant Director of Safety and Hygiene, stated that the Company's interpretation of the Act was that they would provide one representative of miners for each inspection; therefore, they would not provide a second representative of miners on the same property (I.D. No.) without loss in pay."

The reference to "Mine I.D. No." refers to a system of mine identification numbers which the Mine Enforcement Safety Administration issued to certain functionally integrated portions of each mining operation. The fact that the Mine Crusher and the Mill are under the same identification number is the result of a MESA administrative determination and not the result of any effort on the part of the Operator.

Inspector Aldrete traveled to the Mine Crusher to inspect it and Inspector Pascoe

took Representative of Miners Badia to the Mill. Inspector Aldrete returned to the Mill at approximately 3:30 p.m. to discuss the inspection with Inspector Pascoe and to write up their citations.

The testimony of Inspector Pascoe cited by the Petitioner in his Statement of the Case was rebutted by John Caylor, Chief Plant Safety Engineer at Magma Copper Company's San Manuel Mill. Mr. Caylor testified as follows:

> "Q: Mr. Caylor, I think that you heard Inspector Pascoe testify concerning what he believes are economies of scale which are achieved by splitting down into smaller parties, that is taking two (2) inspectors and sending them off in different directions. In your experience, based on your observations at San Manuel, can you relate to the Administrative Law Judge diseconomies of scale which you have observed on the part of MSHA inspectors who split into separate parties?
>
> "A: Well, there have been occasions, for example, of the 7/19 inspection when Chet and Mr. Aldrete first came to our property on this inspection at the Mill I.D. number, where Chet Pascoe and myself were in one inspection party at the coarse ore receiving bins or the storage bin facilities there, we had already inspected the coarse ore bins, and while we were there waiting for the train to take a ride out

to the mine crushing facilities, the second inspection party showed up with the intent, I presume, to also inspect the same facilities. Had we not been there and told them that we had already inspected these facilities, they probably would have repeated the same inspection that we did, and that's just one example."

On March 8, 1979, Administrative Law Judge Lasher issued a Decision containing the following conclusions of law:

> "Where a single regular 'entire mine' inspection is being conducted pursuant to §103(a) of the Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay, even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different areas of the mine."

From that Decision, the Secretary of Labor requested and obtained Discretionary Review. The United Steelworkers of America were dismissed at the trial, but were permitted by the Review Commission to file a Brief as a party. The United Mine Workers were granted Intervenor status.

PERTINENT STATUTORY PROVISIONS

Subsection 103(f) of the Federal Mine Safety and Health Act of 1977 provides, in pertinent part:

> "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall have an opportunity to accompany the Secretary or his authorized representative during a physical inspection of any coal or other mine made pursuant to the provisions of §(a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this Subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss in pay during the period of such participation under the provisions of this Subsection . . ." (emphasis added)

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was issued on May 18, 1981. The Court denied Petitioner's Petition for Rehearing on June 22, 1981. On June 29, 1981, Petitioner filed a Motion to Stay the Issuance of a Mandate pending the filing of a Petition for Writ of Certiorari. No ruling on that Motion has yet been made, nor has a Mandate issued.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

ARGUMENT

I

THE EXPRESS LANGUAGE OF THE STATUTE, TESTIMONY BEFORE THE SUB-COMMITTEES AND FLOOR DEBATE SPECIFICALLY PROVIDE THAT ONLY ONE REPRESENTATIVE SUFFER NO LOSS IN PAY DURING AN INSPECTION.

An abundance of testimony was taken at the House and Senate Hearings on the Federal Mine Safety and Health Act of 1977 regarding the right of the Representative of Miners to accompany Inspectors during an inspection. The great weight of the testimony was directed at the right of accompaniment and virtually no testimony was directed toward compensation during that period. The Respondents in their Briefs before the Review Commission cited absolutely no testimony presented to either Committee to support the general principle that compensation was an important motivating factor necessary to make the right of accompaniment effective. On the contrary, clear inference from virtually all witnesses was that the safety of the workplace was the principal motivating factor

which would make the right of accompaniment effective.

Thomas F. Miechur, President of the United Cement, Lime and Gypsum Workers International Union, testified at length regarding the walkaround provisions. It was a lengthy discussion of walkaround rights, including participation in the pre-inspection conference and post-inspection conference, and not a single mention is made of the question of pay or how it may affect the efficacy of the miner participation. (Transcript of hearing held on March 21, 1977 before the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, hereinafter "H.T.") H.T. 88.

In the testimony of Marco Vestich, Assistant Director, Safety and Health Department, United Steelworkers of America, specific reference is made to the singular nature of the representative of miners who is to accompany the Inspector:

"MR. CORNELL: Do you believe that there is any merit to the claim that this would cause a loss of labor production, if these men were spending their time walking around?

"MR. VESTICH: My feeling is that, if there is any loss of production by that one man walking around, the proper inspection and the proper compliance more than overcome that, in having a safe mine." (emphasis added)

No specific reference to the question of payment of the miners during the walkaround period is made (H.T. 204).

On testimony of April 1, 1977, Honorable Arnold H. Packer, Assistant Secretary for Policy Evaluation and Research, U.S. Department of Labor, and Carin N. Clauss, Solicitor, and Robert LaGather, Deputy Solicitor, testified regarding the Act. Mr. Packer's suggestions on behalf of Ms. Clauss and Mr. LaGather regarding walkaround are as follows:

"With regard to some of the provisions of H.R. 4287, we would have a few suggestions for further consideration in strengthening the protections it will offer to miners. Under the Bill, participation of miners in the inspection processes a key element is (sic) assuring both a complete inspection and the active involvement of the miners themselves in achieving a healthier and safer work-

place. We suggest that the provision be made for additional involvement of the miners' representatives on the overall inspection activities. For example, a provision for employee representation at opening and closing conferences held by inspectors with the mine operators might be made." (H.T. 310)

Note that no reference to compensation is made.

In the statement of Hon. Cecil D. Andrus, Secretary of the Interior, the following comments were made:

"Section 104(e) of the Bill authorizes representatives of the operator and miners to accompany the inspector during an inspection. Mr. Chairman, we consider it vitally important that this be extended to participation in pre-inspection and post-inspection conferences as currently provided in the Coal Act." (H.T. 322)

Note that no reference to compensation is made.

In the statement of Robert Barrett, Administrator of the Mine Enforcement and Safety Administration, the following comments are made with regard to the statutory rights of miners:

> "H.R. 4287 provides basic statutory rights to miners which are developed from the existing Federal Coal Mine Health and Safety Act of 1969 and OSHA. These provisions include walkaround rights and the right to be protected against discrimination or discharge on health and safety issues. We endorse these provisions and urge that they be strengthened to insure: first, that miners or the authorized representative of miners not only be permitted to accompany the Federal Inspector during the physical inspection of any mine, but also to participate in any conference held at the beginning or conclusion of an inspection; second, that the discharge and discrimination safeguards in the Bill will be expanded to include within their scope the representative of miners; and third, that amendments be made to insure that miners and their representatives are given notice of enforcement actions and the administrative and judicial proceedings relating thereto." (H.T. 336-337)

Note again that no reference to compensation is made.

Virtually identical testimony was presented to the Senate Subcommittee on Labor of the Committee on Human Resources in its hearings on March 30, March 31 and April 1st of 1977. See Record of the Senate Hearings, pp. 370, 371, 381, 387 and 429.

Following the testimony before the Committee, a vigorous floor debate was had con-

cerning various provisions of the Act. At page S10270 of the Congressional Record of June 21, 1977, Senator Javits states:

> "This Bill only requires one miner to be compensated for the time he spends in accompanying the inspector. Other miners and company representatives may accompany inspectors and participate in the inspection. They may or may not be paid by the Operator, but we insist that one miner who accompanies the inspector should be paid, and there should be a provision that at least one miner should have the opportunity."
>
> * * *
>
> "MR. HELMS: Mr. President, will the Senator yield?"
>
> "MR. JAVITS: I yield."
>
> "MR. HELMS: Did I understand the Senator to say that the operator would be required to pay for one?"
>
> "MR. JAVITS: That is correct, one miner who accompanies the inspector. That is all we say."

The sense of the colloquy is clear. Where one inspector is making an inspection, one Representative of Miners shall be paid. Where "other miners and company representatives may accompany inspectors and participate in the inspection", one miner shall be paid.

Respondents failed to cite one iota of evidence that any witness testifying before either the House or the Senate felt that compensation of the Representative of Miners played an important motivating role in his participation in the inspection process. Petitioner submits that it is unable to locate a single witness who so testified. Furthermore, Respondent's argument that compensation is essential for all Representatives of Miners in order to perform an effective inspection seems misdirected. That argument should have been made to the U.S. Cognress so that the proper provision could have been made in Section 103(f). It seems incongruous to argue that Congress was aware that only compensated Representatives of Miners would be effective and that they would then place any restriction on such compensation to Representatives of Miners.

The contention that each Inspector is entitled to a compensated Representative of Miners, without limit, is unsupported by the

testimony before Congressional Committees and is directly refuted by floor debate and the express language of the statute. Speculation regarding the penumbras of this legislation are unnecessary and unwarranted.

II

THE REVIEW COMMISSION ERRED IN DISREGARDING THE EXPRESS LIMITATIONS PLACED IN §103(f) BY CONGRESS.

The Review Commission began its opinion with a burst of candor which would be refreshing if it were not so pernicious. The Review Commission stated that it found the express language of limitation established by Congress in §103(f) to be inconsistent with the high purpose which it holds for the Act:

> "We do not think it is enough to rely, as the administrative law judge did, only upon the literal language of section 103(f). The literal words of a statute may not be the best guide to the legislative purpose when they appear to conflict with the congressional purpose for creating a right or produce a result that is illogical."

Congress proposes, the Review Commission disposes, and the first thing disposed of is

the limitation imposed by Congress on MSHA and the Review Commission. The Review Commission dwells in detail on the reasons for requiring employers to pay employees for assisting the MSHA inspectors:

> " . . . Walkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states that the purpose of the right to accompany inspectors is to aid the inspection. The Senate Committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a 'full' inspection, and 'enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness.' S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) ['1977 Legis. Hist.']. The purpose of the right to walkaround pay granted by section 103(f) is clear: to encourage miners to exercise their right to accompany inspectors." [Decision of Dec. 10, 1979 at pp. 4-5]

Imbued with a high sense of purpose, the Review Commission blithely amends the Act to fit what it believes Congress should have said:

"In our view, the Congressional purpose for limiting walkaround pay would not be frustrated by requiring that one miner in each inspection party be paid." [Decision, p. 4]

Since the Review Commission intends to amend the statute to provide that one Representative of Miners per inspection party shall suffer no loss in pay, the Petitioner suggests that the statute be read with the Review Commission's proposed amendments, which appear underlined in this text:

"[1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection party of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection party and to participate in pre- or post-inspection party conferences held at the mine. [2] Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. [3] Such representative of miners who is an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection party made under this subsection. [4] To the extent that the Secretary or authorized representative of the Secretary determines that more than one represen-

> tative from each party would further aid the inspection party, he can permit each party to have an equal number of such additional representatives. [5] However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. [6] Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." [Sentence numbers and emphasis added]

It is obvious that Congress did not intend the term "inspection" to mean "inspection party", nor did Congress intend that each inspector would constitute an "inspection party" entitled to a paid Representative of Miners.

The Review Commission extols the benefits of requiring employers to pay employees for assisting in MSHA inspections. Congress recognized the argument to some extent and provided that one such employee be paid during each inspection. The Review Commission apparently believes that "more is better". Employers understandably view such an approach with a jaundiced eye. Employers

under the jurisdiction of MSHA provide each employee with forty (40) hours of paid safety instruction when the person is first hired, eight (8) hours of paid refresher training each year thereafter, and additional paid safety training each time a task is assigned which is new to the employee. Large operators employ large staffs of professional safety engineers whose sole function it is to maintain safety standards throughout the working place. These factors should be considered in evaluating the "training" and "participation" benefits supposedly arising out of the paid walkaround representative. The Congressional limitation of one paid representative of miners per inspection seems to be a reasonable and measured compromise.

The Review Commission seems hard-pressed to understand why Congress would place any restriction at all on the walkaround right. They dismiss the limitation in a single sentence:

> "The walkaround pay limitation appears designed to minimize the operator's economic burden by requiring him to pay one miner who is in that one inspection party." [Decision, p. 4]

If the Review Commission had exercised the same diligence and imagination reflecting on the limiting language of §103(f) as it did on the supposed virtues of walkaround pay, it might have struck the same balance which Congress did. After MSHA has been assured its one paid Representative of Miners for the inspection, additional miner participation is voluntary and presumably proportionate to need. Additional employees may participate in the inspection process as they perceive the need to do so. Congress provided that, beyond the initial paid representative, additional "walkaround" representatives would be volunteers motivated by the desire to correct perceived safety problems rather than being motivated by the desire to collect pay for walking around the working place. Petitioner submits that Congress specifically provided that "only one such representative of miners

who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection." The limitation is clear, logical, and a balanced response to the question of providing for pay of employees during an inspection. The Review Commission was clearly in error in reversing the Decision of Administrative Law Judge Lasher.

III

THE NINTH CIRCUIT IGNORES THE ERRONEOUS ASSUMPTIONS OF THE REVIEW COMMISSION REGARDING MOTIVATING EFFECT OF "WALKAROUND" PAY.

The Petitioner has urged at each step of these proceedings that absolutely no factual basis was presented to support the assumption that payment to more than one representative of miners would make the inspections more effective. The Ninth Circuit Opinion in this case infers that payment to more than one representative of miners would have prevented the Scotia Mine Disaster of 1976:

> "The Senate Report explains that need for the legislation was demonstrated by a series of mining disasters, in particular the Scotia disaster in which 23 miners and 3 federal inspectors died from the explosion of accumulated methane gas. The committee staff report on the Scotia disaster found that one-man inspections of that mine had been ineffective. Indeed, the report found 'evidence in the record to indicate that Scotia personnel, rather routinely, engaged in deceptive practices with respect to one-man . . . inspections. While an inspector was checking for adequate ventilation, for example, in one section of the mine, Scotia personnel were robbing air from another section to assure that the section being inspected was receiving adequate air supplies.' Staff of House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong., 2d Sess., Scotia Coal Mine Disaster (Comm. Print 1976) at 28-29."

This assumes that employees will not assist the Secretary if their employer does not pay them for the time so spent.

Contrary to the assumptions of the Review Commission and the Ninth Circuit, no factual basis for this assumption exists. The excursion of the Ninth Circuit from the record on appeal is answered by the United States Department of Labor, Occupational Safety and Health Administration, in its com-

ments on the principle of walkaround pay, published on Friday, May 28, 1981, 46 FR 28842, et seq.:

> "The rule, when promulgated, was based primarily on the theory that failure to compensate for time spent on the walkaround would chill employee participation in the inspection process. However, on the basis of the record, the agency finds that a walkaround compensation regulation would have only a negligible effect on the number of employees who participate in OSHA inspections and on the Secretary's enforcement efforts. As noted in the January 16, 1981 Federal Register, a considerable number of inspections are conducted in establishments in which there are no employee representatives and the OSHA inspector consults with a reasonable number of employees, in accordance with Section 8(e). See 46 FR 3588. In those cases in which an employee representative accompanies the OSHA inspector on the walkaround, the record indicates that the vast majority of representatives are in fact compensated for their time. Furthermore, in those cases in which compensation is not available, the record does not establish that the lack of pay operates as a significant disincentive to employee participation. Thus, it appears that a walkaround compensation regulation will encourage only a few employee representatives to participate in the walkaround. And, even where there is no walkaround representative, in accordance with the requirements of Section 8(e), the compliance officer consults with individual employees at the worksite. In view of its minimal impact on employee participation and on the Secretary's ability to

effectively enforce the Act, the agency finds that the regulation is not a necessary exercise of his rulemaking authority." (at 43 FR 28843) (emphasis added)

The Petitioner submits that the Secretary of Labor is correct in his assessment tha "walkaround" pay does not materially improve the efficiency of the health and safety inspection.

CONCLUSION

The testimony of the witnesses before the various Committees, the Commmittee Reports, the floor debate, and the express language of the statute itself make it clear that employee participation in the inspection process was to be compensated for one employee only. The Government's interest in having an employee available as a source of information is thereby assured. Other representatives are allowed to participate as they perceive the need to do so. This allows employees to participate when they take exception to the conditions of their place of

work. The "one paid employee" limitation assures the Government of a source of information during an inspection, and the employer is protected against having to compensate superfluous representatives during inspections. The Review Commission erred when it disregarded the express limitation on the number of employees to be compensated while participating in an MSHA inspection.

RESPECTFULLY SUBMITTED this 21st day of July, 1981.

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STATE OF ARIZONA)
) ss.
County of Maricopa)

JULIE E. LAMBIE, being first duly sworn, upon her oath deposes and states:

That she is a citizen of the United States, over 18 years of age, and not a party to the within cause; that she is a secretary with the office of John F. Mills and N. Douglas Grimwood, representing the Petitioner in the foregoing matter; that on the day of July, 1981, she served three (3) copies each of the foregoing Petition for Writ of Certiorari on the following parties:

Michael A. McCord, Counsel
Appellate Litigation
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, Virginia 22203

Dennis D. Clark, Esq.
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Federal Mine Safety and
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1730 K Street, N.W.
Washington, D.C. 20006

Mary-Win O'Brien
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United Steelworkers of
America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222

that each of said envelopes was sealed with postage prepaid and deposited in the United States mail at Phoenix, Arizona; and that there is regular delivery service to each place so addressed.

Julie E. Lambie

SUBSCRIBED AND SWORN to before me this day of July, 1981.

Notary Public

My Commission Expires:

MAGMA COPPER COMPANY,
Petitioner,

v.

SECRETARY OF LABOR, Mine Safety and Health Administration, and Federal Mine Safety and Health Review Commission, Respondents,

United Steelworkers of America, AFL-CIO-CLC, Intervenor.

No. 79-7687.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 18, 1980.

Decided May 18, 1981.

Mine operator brought action against the Secretary of Labor, Mine Safety and Health Administration, and Federal Mine Safety and Health Review Commission challenging holding of the Commission which reversed decision of administrative law judge which vacated citation and withdrawal order when operator refused to pay a second miner's representative for time spent accompanying an inspector. The Court of Appeals, Duniway, Circuit Judge, held that under the Federal Mine Safety and Health Act, when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay if he is an employee of mine operator.

Affirmed.

1. Mines and Minerals ⇐92.5

Interpretative bulletin of the Department of Labor governing mine inspections is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Federal Mine Safety and Health Act. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

2. Statutes ⇐235

Safety legislation is to be liberally construed to effectuate congressional purpose.

3. Mines and Minerals ⇐92.5

Under the Federal Mine Safety and Health Act, when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay if he is an employee of mine operator. Federal Coal Mine Health and Safety Act of 1969, § 103(f) as amended 30 U.S.C.A. § 813(f).

Petition for Review of Decision of the Federal Mine Safety and Health Review Commission.

Before DUNIWAY and TRASK, Circuit Judges, and JAMESON,* District Judge.

DUNIWAY, Circuit Judge:

The issue in this case is whether § 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), requires that,

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

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when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany *each* inspector without loss of pay if he is an employee of the mine operator. The Federal Mine Safety and Health Review Commission held that the Act does so provide, and we affirm.

I. *Background.*

The facts are not in dispute. Magma Copper Company ("Magma") operates a copper mine and mill in San Manuel, Arizona. The milling complex is large, including a receiving bin, a mine crusher, a mill crusher, a concentrator building, a molybdenum plant and a filter plant. One of these buildings is three stories tall and a quarter of a mile long, and the complex as a whole is spread out over an area of several miles. The milling complex is a "mine" subject to the Act. 30 U.S.C. § 802(h).

On July 26, 1978, two inspectors from the Department of Labor arrived at the milling complex in order to continue an "entire mine" or "regular" inspection under § 813(a) of the Act. The inspectors planned to split up, each of them inspecting a different part of the mill, and they asked company officials to provide them with two miners' representatives to participate in the inspection. The company agreed to assign two miners' representatives to the inspection, but took the position that § 813(f) of the Act only requires that one miners' representative receive walkaround pay. Unwilling to ask a miners' representative to suffer loss of a day's wages, the inspectors went forward with the inspection with only one miners' representative. As they had planned, the inspectors formed two inspection parties and examined different—and geographically distant—sections of the milling complex.

Because of Magma's refusal to pay a second miners' representative for time spent accompanying an inspector, the inspectors issued a citation to Magma under § 814(a). The citation was followed by a withdrawal order under § 814(b). Magma contested the citation and withdrawal order, and the Administrative Law Judge, agreeing with Magma's interpretation of the Act, vacated the citation and order. The Federal Mine Safety and Health Review Commission ("Commission") reversed, holding that "one miners' representative in each inspection party must be paid for time spent accompanying an inspector ... engaged in an inspection of the mine 'in its entirety'...." The Commission reinstated the citation and withdrawal order and Magma petitioned this court for review.

II. *The Merits.*

Section 813(f) of the Act provides in pertinent part as follows:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any ... mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.... Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representa-

> tive from each party would further aid in the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection....

The question here is whether the limitation in the final sentence quoted above —"However, only one such representative of miners ... shall be entitled to suffer no loss of pay ..."—means that when one inspector or one inspection party is accompanied by more than one miners' representative only one representative is entitled to walkaround pay, or whether it means that in all circumstances, even where there is more than one inspection party, only one miner shall be paid.

In an Interpretative Bulletin issued in April, 1978, 43 Fed.Reg. 17546 (April 25, 1978), some months before the inspection of the Magma facility, the Department of Labor started its view that the limiting sentence applies only to the situation where one inspector or one inspection party is accompanied by more than one miners' representative. The Department reasoned that this is the natural way to interpret the limitation; the limiting sentence "directly follows a provision authorizing an inspector to allow more than one representative of miners to accompany him." *Id.* at 17549. The Department also said that to extend the limitation to a case in which "it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity" *Id.* would be both illogical and contrary to the policies of the Act:

> ... the occasions when several inspectors are at a mine frequently include inspections of larger mines or mines with special problems requiring concentrated attention. It is precisely in those mines that participation by miners' representatives will ordinarily be most helpful. Moreover, the total time required to complete an inspection of a mine would be shorter if more inspectors are involved and they are inspecting different areas the mine. Thus ... the total outlay in wages ... would be approximately the same, whether there is a single inspector accompanied by a single paid representative of miners for a longer period of time or several inspectors each accompanied by a paid representative of miners for a proportionately shorter period of time. *Id.*

Finally, the Department said that to restrict the right to walkaround pay because of the Department's decision to send an inspection team of several inspectors rather than a single inspector for a greater period of time, would be to sacrifice "the fundamental purpose" of § 813(f)—"to encourage participation by miners in inspections through their representatives." *Id.* at 17548.

The Interpretative Bulletin states further that in situations where there are several inspectors who are proceeding together as a group on inspection activity, the limitation on the number of paid representatives would apply. "Only one representative accompanying the single group of inspectors would be entitled to suffer no loss of pay." *Id.* at 17549. Thus the bulletin restricts the ruling to cases in which there is more than one inspector, each carrying out a separate part of the inspection, so that the cost to the operator will usually be no more than if there were but one inspector who did the whole job, accompanied by but one representative of miners.

The Commission concurred in the Department's interpretation of the section in light of the policies of the Act. We agree.

[1, 2] At the outset, we note that the Department's interpretative bulletin "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp. v. Marshall*, 1980, 445 U.S. 1, 11, 100 S.Ct. 883, 890, 63 L.Ed.2d 154. *Montana Power Co. v. EPA*, 9 Cir., 1979, 608 F.2d 334, 344–345, 350; *Cf. Irvington Moore, et al. v. Occupational Safety and Health Review Commission*, 9 Cir., 1977, 556 F.2d 431, 434 ("Since in this case the Secretary's interpretation of his own regulations has been affirmed by the Commission, this interpretation must be accorded substantial weight.") We note also that "safety legislation is to be liberally construed to effectuate the congressional purpose," *Whirlpool Corp., supra*, 445 U.S. at 13, 100 S.Ct. at 891, and that "in cases involving conflict between rules of construction, the courts will strive to adopt that construction which best effectuates the legislative purpose." *Reich v. Webb*, 9 Cir., 1964, 336 F.2d 153, 157. *See Brennan v. Keyser*, 9 Cir., 1974, 507 F.2d 472, 477 ("Exceptions to humanitarian and remedial legislation must be narrowly construed.").

The language of the statute supports the Department's construction of it. It is not disputed that an inspector is the "authorized representative" of the Secretary. If we substitute "inspector" for "Secretary or his authorized representative," the statute, § 813(f), will read:

> . . . a representative authorized by [the operator's] miners shall be given an opportunity to accompany the [inspector] during the . . . inspection. . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay. . . . To the extent that the [inspector] determines that more than one representative of each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners . . . shall be entitled to suffer no loss of pay. . . .

Throughout the section the reference to the representative of the Secretary, i. e., the inspector, is in the singular. This language would support a construction that a representative of the miners is to accompany *each* inspector, and is not to suffer loss of pay. The sentence that says that "only one such representative . . . shall be entitled to suffer no loss of pay" refers back, by use of the phrase "such representative," to the preceding sentence, which provides that "the inspector may determine that more than one representative . . . would . . . aid the inspection," and authorizes "him," i. e., the inspector, to permit each party to have an equal number of representatives.

[3] Magma does not argue that the Secretary may not send more than one inspector to inspect, or that, having sent more than one, he must have all of them inspect together, rather than have each inspect a different part of the mine. If the Secretary does send more than one, § 813(f), read literally, will apply to each of them. This is the way that the bulletin applies the section, except in one respect. If more than one inspector do the inspection together, they are treated like one inspector for the purpose of § 813(f). It can be persuasively argued that this limitation gives more relief to an operator than the section requires, but the limitation is eminently sensible.

Magma argues that § 813(f) is ambiguous, and that the legislative history supports or even requires a construction of the "However ..." sentence to forbid requiring walkaround pay to more than one employee during any inspection of the entire mine.

We agree with the Commission that the legislative history of § 813(f) does not directly refer to the precise issue that we face here. The only extended discussion of walkaround pay occurred in a colloquy between Senators Helms and Javits. Senator Helms opposed the provision because of the expense to mine operators: "Some Companies, I am advised, have reported that there are as many as 5 inspectors in their mines at all times, and that ... blitz inspections sometimes require 20 or more inspectors." Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* (Committee Print July 1979) (hereinafter Legislative History) at 1053.

Speaking in response, Senator Javits argued that miner participation in inspections is essential to increased miner awareness of safety problems and that such participation could not be expected unless the miners were paid for their time. At the conclusion of these remarks he stated: "This bill only requires one miner to be compensated for the time he spends in accompanying the inspector. Other miners and company representatives may accompany inspectors and participate in the inspection. They may or may not be paid by the operator, but we insist that one miner who accompanies the inspector should be paid, and there should be a provision that at least one miner should have that opportunity." *Id.* at 1055.

Magma argues that Senator Javits' concluding comments indicate his understanding that the provision of walkaround pay is limited to one miner regardless of the number of inspectors. It is by no means clear that that is so. The colloquy is equivocal. Senator Javits' comments can be understood to refer only to the situation where more than one miner accompanies a single inspector. Moreover, it is significant that Senator Javits did not flatly contradict Senator Helms' apparent understanding that where several inspectors are present, the measure provides that one representative of miners may accompany each inspector without loss of pay. As we have seen, the Interpretative Bulletin does not go so far. At best, this exchange leaves the issue in doubt.

The legislative history and the statute itself could not be clearer, however, as to the purposes of the legislation in general and of the walkaround pay provision in particular. As Senator Javits explained, the walkaround pay provision seeks to assure that miners will exercise their right to participate in inspections. The right of participation, in turn, attempts to increase miners' awareness of safety problems as well as to provide inspectors with a guide familiar with working conditions in the mine. Legislative History at 1054. *See* S.Rep.No.95–181, 95th Cong., 1st Sess. at 28, reprinted in Legislative History at 616. The importance of miner participation in safety is repeatedly emphasized throughout the legislative history of the Act—"If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." *See* S.Rep.No.95–181, *supra*, at 35, reprinted in Legislative History at 623.

The walkaround pay provision and the participation right are both aimed at the

protection of the health and safety of miners—the single overriding purpose of the legislation. The Senate Report explains that need for the legislation was demonstrated by a series of mining disasters, in particular the Scotia disaster in which 23 miners and 3 federal inspectors died from the explosion of accumulated methane gas. The committee staff report on the Scotia disaster found that one-man inspections of that mine had been ineffective. Indeed, the report found "evidence in the record to indicate that Scotia personnel, rather routinely, engaged in deceptive practices with respect to one-man ... inspections. While an inspector was checking for adequate ventilation, for example, in one section of the mine, Scotia personnel were robbing air from another section to assure that the section being inspected was receiving adequate air supplies." Staff of House Comm. on Education and Labor, Subcomm. on Labor Standards, 94th Cong., 2d Sess., *Scotia Coal Mine Disaster* (Comm. Print 1976) at 28–29.

Magma invites us to adopt an interpretation of the statute that would force the Department to choose between effective simultaneous inspections by several inspectors and the participation of miners in inspections. Under Magma's interpretation, in order to assure that one miner accompanies an inspector throughout the entire mine, the Department must risk the sort of hoodwinking that occurred, with tragic consequences, in the Scotia mine. The clear outcome of such an interpretation is a reduction in safety when safety is the purpose of the legislation. And if safety is compromised on the one hand by Magma's interpretation, there is, on the other hand, simply no benefit gained by anyone. We agree with the Department's Interpretative Bulletin that the mine operator can be put to little if any additional expense by a comparatively quick inspection by several inspectors each accompanied by one paid miners' representative as opposed to a far lengthier inspection by one inspector and one paid miner. In short, the interpretation urged by Magma makes little sense while it contravenes the basic purpose of the statute.

Finally, Magma's reliance on *Leone v. Mobil Oil Corporation*, D.C.Cir., 1975, 523 F.2d 1153, is misplaced. In that case the court held that neither the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, nor the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, requires payment for the walkaround time of an employee representative. Unlike those two statutes, however, the Federal Mine Safety and Health Act specifically provides for walkaround pay. The statutes are not comparable and the *Leone* case is, therefore, simply irrelevant to the issue here.

We affirm the decision of the Commission.

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Appendix B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 10, 1979

MAGMA COPPER COMPANY	:	
	:	
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. DENV 78-533-M
	:	
and	:	
	:	
UNITED STEELWORKERS OF AMERICA	:	

DECISION

The question in this case is whether a mine operator is required to pay only one representative of miners for time spent accompanying an inspector when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine. For the reasons that follow, we find that one miners' representative in each inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine "in its entirety"

under 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et. seq. ["the 1977 Act"].

Magma Copper Company operates a large copper mine complex near San Manuel, Arizona. The complex includes an underground copper mine and milling facilities. On July 26, 1978, two inspectors from the Department of Labor's Mine Safety and Health Administration arrived at the complex to continue an inspection of the milling facilities that had begun the previous week under section 103(a) of the 1977 Act. That section requires that each surface mine be inspected in its entirety at least two times a year and that each underground mine be inspected in its entirety at least four times a year.

Magma's milling facilities consist of several buildings and other structures. The milling operation includes a receiving bin, a crushing facility, a concentrator building, a molybdenum plant, and a filter plant. One building is three floors high and a quarter

mile long. The structures in the complex are as much as seven miles apart.

To expedite inspection of the milling facilities, the inspectors formed two inspection parties to visit different work sites. They told Magma officials that they would like a miners' representative to accompany each of them. Magma officials agreed to assign two miners' representatives to accompany the inspectors but they stated that Magma would pay only one of them. Only one miners' representative accompanied an inspector. The other inspector was not accompanied by a miners' representative because the inspectors were reluctant to ask a miner to accompany them without a guarantee that he would suffer no loss of pay.

The inspectors examined different milling facilities. Their activities took them about 6 to 7 miles apart, and consumed several hours. They did not see each other again until they returned to one of Magma's offices to perform some post-inspection

paperwork.

Because of Magma's refusal to pay two miners' representatives for time spent accompanying the inspectors, a citation under section 104(a) of the 1977 Act that alleged a violation of section 103(f) was issued. When Magma again declined to pay two miners' representatives, one of the inspectors issued a withdrawal order for failure to abate under section 104(b). The order did not require the withdrawal of any miners from mining operations. Magma then filed a notice of contest under section 105(d) of both the citation and the withdrawal order.

Administrative Law Judge Lasher conducted a hearing and decided that because of the language of section 103(f)[1], only one miners' representative was entitled to be paid for participating in the inspection. Specifically, he held:

> Where a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the [1977] Act by two or more inspectors, only one representative of miners is entitled to parti-

> cipate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different parts of the mine."

Judge Lasher believed that this interpretation of the walkaround pay provision was necessary because section 103(f) provides in part that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation . . ." He consequently vacated the citation and withdrawal order. On April 11, 1979, the Commission granted petitions for discretionary review filed by the Secretary of Labor and the United Steelworkers of America. On July 31, 1979, we heard oral argument.

We do not think it is enough to rely, as the Administrative Law Judge did, only upon the literal language of section 103(f). The literal words of a statute may not be the best guide to the legislative purpose when they appear to conflict with the Congres-

sional purpose for creating a right or produce a result that is illogical. See Central Hanover Bank & Trust Co. v. Commissioners, 159 F.2d 167, 169 (2d. Cir. 1947) (per L. Hand, J.); United States v. American Trucking Associations, 310 U.S. 534, 543 (1940).[2]

The language of section 103(f) conveys the impression that Congress expected that one inspection party will visit all parts of the mine and one paid miners' representative will therefore fully participate in the inspection. The walkaround pay limitation appears designed to minimize the operator's economic burden by requiring him to pay only one miner who is in that one inspection party.

However, several inspectors are often sent into large mines to expedite inspection of the entire mine.[3] Providing walkaround pay only to one miners' representative when several inspection parties are inspecting the entire mine would make the right to walk-

around pay dependent on the number of inspectors sent to the mine. We agree with the Secretary that it is doubtful that Congress intended this illogical result. This operator has made no showing in this case that the presence of two inspection parties prejudiced him.

In our view, the Congressional purpose for limiting walkaround pay would not be frustrated by requiring that one miner in each inspection party be paid. We share the Secretary's judgment that the cost to an operator of walkaround pay when two inspection parties are formed should roughly approximate the cost when only a single party is formed because the number of hours spent by paid miners' representatives in the inspection should be about the same in both cases. We also believe that the construction of 193(f) urged by Magma would frustrate the purposes for which Congress granted a right to walkaround pay. Walkaround pay was designed to improve the thoroughness of mine

inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a "full" inspection, and "enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) ["1977 Legis. Hist."]. The purpose of the right to walkaround pay granted by section 103(f) is also clear: to encourage miners to exercise their right to accompany inspectors. Id.[4]

It was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. If only one of the inspectors would be assured of receiving the assistance of a miners' representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure. By providing a more efficient deployment of inspectors through multiple inspection parties, the Secretary should not be denied the assistance of the miner. Neither should the miner be denied the right to participate in such inspection without pay.

Accordingly, the Judge's decision is reversed, and the citation and withdrawal

order are affirmed.

/s/ Jerome R. Waldie
Jerome R. Waldie, Chairman

/s/ Richard V. Backley
Richard V. Backley, Commissioner

/s/ Frank J. Jestrab
Frank J. Jestrab, Commissioner

/s/ A. E. Lawson
A. E. Lawson, Commissioner

/s/ Marian Pearlman Nease
Marian Pearlman Nease,
Commissioner

FOOTNOTES

[1] Section 103(f) of the 1977 Act reads as follows:

> [1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. [2] Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. [3] Such representative of miners who is an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [4] To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. [5] However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. [6] Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. [Sentence numbers and emphasis added.]

[2] In our view, the legislative history does not specifically address the question before us. Magma disputes this. It claims that a statement made by Senator Javits on the Senate floor directly addresses this issue and authoritatively resolves it in Magma's favor. We disagree.

During the Senate debate on the bill from which the 1977 Act was largely derived, Senator Helms introduced an amendment to strike out the third and fifth sentences of what is now section 103(f), and thereby eliminate the right to walkaround pay. 1977 Legis. Hist. at 809, 812. Senator Javits, speaking in opposition to the amendment of behalf of the bill's managers, gave several reasons why the amendment should be defeated. Id. at 1054-1056. During his lengthy remarks, he commented that the bill required that only one miners' representative be paid. Id. at 1055-1056. Magma believes that Senator Javits' comment shows that section 103(f) was designed with multiple inspection parties in mind. We do not. Although Senator Helms had briefly mentioned multiple inspection parties, Senator Javits' extremporaneous remarks neither bear upon nor mention multiple parties. The Senator seems to have spoken only to the common and simple situation of one or more inspectors forming only one inspection party. We therefore conclude that the legislative history does not speak directly to the issue before us.

[3] A report by the National Coal Association and the Bituminous Coal Operators Association that was submitted to the Labor Standards Subcommittee of the House Committee on Education and Labor states:

> "Some coal mines are very large: one mine, for instance, is the size of the island of Manhattan underground. That mine, along with many others, employs several hundred miners who work in

separate geographic underground areas at many diverse tasks under varying degrees of supervision. It is common for miners to have to travel an hour or more underground just to get to their work areas from the mine entrance. Thus, a 'complete inspection' of an entire mine can take a very long time."

NCA, BCOA, "Federal Coal Mine Health and Safety Act 1969: A Constructive Analysis with Recommendations for Improvements", at 30 (1977).

4 The Senate committee report states:

Section 104(e) [103(f) in the final bill] contains a provision based on that in the Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection ..... The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties .....

Appendix C

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
4015 Wilson Boulevard
Arlington, Virginia 22203

MARCH 8, 1979

MAGMA COPPER COMPANY,	:	Application for Review
	:	
Applicant	:	Docket No. DENV-78-533-M
	:	
v.	:	San Manuel Mill
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	
and	:	
	:	
UNITED STEELWORKERS OF	:	
AMERICA,	:	
	:	
Respondents	:	

DECISION

Appearances: N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, Phoenix, Arizona, for Applicant; Michael V. Durkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent MSHA.

Before: Administrative Law Judge Lasher

I. Statement of the Case

Applicant seeks review of Order No. 376821 dated July 26, 1978, which was issued

by MSHA Inspector Chester A. Pasco. The order was issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977[1] citing Applicant with failing to abate a previously issued citation within the time required. The citation, which was issued earlier on July 26, 1978, by Inspector Pascoe, cited Applicant for refusing to pay a representative of the miners for his participation in an inspection conducted on July 26, 1978.[2]

The application for review which initiated this proceeding was timely filed and perfected on August 14, 1978.. Applicant challenges both the order and the citation which latter document indicates that there were two MSHA inspectors present at the mine whose intent was to form two parties to expedite the inspection and that Applicant refused to allow a second representative of miners to accompany the second MSHA inspector without suffering a loss in pay.

A hearing was held in Phoenix, Arizona, on November 13, 1978, at which both parties were represented by counsel.[3]

II. Findings of Fact

The essential happenings involved in this matter are not in substantial dispute.

Magma Copper Company operates a large copper mine and mill in the vicinity of San Manuel, Arizona. MSHA, successor to MESA, inspects these operations periodically. The mill, which includes the crushing facility, even though it is located near the mine site (Tr. 56), has a mine identification number separate from that of the mine. The mill consists of a mine crusher, a mill crusher, a concentrator, a molybdenum plant, and a filter plant. The mill I.D. number covers several buildings, some of which are one-quarter mile long and three stories tall.[4]

On July 26, 1978, inspectors Chester A. Pascoe and Thomas Aldrette, authorized representatives of the Secretary, arrived together at the San Manuel Mill to continue an ongoing

regular "entire mine" inspection (Tr. 34-35, 55) of the mill which had begun the previous week. The inspectors drove to the site in the same car and coordinated their planned inspection on the way to the site. They had been orally assigned to conduct this inspection by their supervisor (Tr. 55). When they arrived at the mill, a conversation with company officials ensued in which the inspectors discussed the fact that they were going to continue the inspection and indicated that they "would like a miners' representative to accompany each inspector." They were advised that Applicant would furnish two miners' representatives, but that only one would suffer no loss of pay (Tr. 37). Miners' representatives did not accompany the inspectors the previous week because the unions had not furnished Applicant with a list of such representatives (Tr. 37-39, 52).

Inspectors Pascoe and Aldrette selected Ernest Badia to accompany them on their inspection (Tr. 51, Ct.Exh. 1). The inspectors

knew that a second representative would have been selected had they requested one (Tr. 47-48), but they were also aware that Applicant's position was that so long as one representative was being paid, no other representative would be paid for the same period of participation (Tr. 95).

After the inspectors asked that they be provided two representatives of miners and that both representatives be paid for the time spent assisting in the inspections (Tr. 37), Horace Carter, Assistant Director of Safety and Industrial Hygiene, read them a portion of section 103(f) of the Act, which stated: "However, only one such representative of miners who is an employee of the Operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection" (Tr. 95). Inspector Pascoe then issued the citation and, subsequently, the order based on the Applicant's refusal to pay the second representative of miners. They provide as follows:

Citation #376720: "A representative of miners was not given the opportunity to accompany an authorized representative of the Secretary of Labor on a Safety and Health inspection. The Company allowed a representative of miners to accompany one MSHA inspector on the inspection, but refused to allow a representative of miners the opportunity to accompany second [sic] MSHA inspector on the same property (same I.D. No.) without suffering loss of pay. The intent was to form two (2) parties to expedite the inspection."

Order #376821: "Mr. Horace A. Carter, Assistant Director of Safety and Hygiene, stated that the Company's interpretation of the Act was that they would provide one representative of miners for each inspection; therefore, they would not provide a second representative of miners on the same property (I.D. No.) without loss of pay."

The citation was issued at 11:05 a.m. and it required that abatement be completed by 12:30 p.m. The inspectors then went to lunch. After they returned, Mr. Carter indicated that his position had not changed. Consequently, Inspector Pascoe issued the order of withdrawal.

Ernest Badia, the representative of the miners who was provided with pay, accompanied Pascoe. However, a representative of the miners with pay was not provided to Inspector

Aldrette. Pascoe and Aldrette examined separate parts of the mine (mill) as planned and their inspections took them a distance of 7 miles apart. The inspections took approximately 2 hours. The inspectors saw each other again when they subsequently returned to the safety engineer's office to do their paper work. There was no connection between the activities of the two inspectors during the full period of their respective inspecting (Tr. 37, 40-45, 47).

Inspector Pascoe did not request that a second representative be asked whether he desired to walk around without pay in order to justify the order of withdrawal because the second representative would have to stand the loss of a day's wages (Tr. 61).

The regular inspection in question took approximately 6 days (Tr. 62) off and on during the period July 19 - August 1, 1978 (Tr. 57, 58).

III. Discussion

The Applicant maintains that while the Act grants representatives of miners the right to volunteer for walk-around activities, it limits the number of representatives who shall be paid for such activities to one. Applicant contends that it was not in violation of section 103(f) of the Act, since it did pay one of the two miners' representatives for participation in the inspection conducted on July 26, 1978.

MSHA contends that one representative should be paid for accompanying each inspector conducting an inspection, and, that there is no limitation on the number of inspectors (Tr. 99). MSHA's position in this connection is more fully set forth in Interpretative Bulletin No. 1, issued April 1, 1978, 43 FR 17546 at 17549:[5]

> "[T]here are also occasions when there is more than one inspector at a mine, such as when the mine is so large that it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity. Inspectors may also arrive to

conduct special "spot inspections" at a mine where a "regular inspection" of the mine is already in progress. There are also situations when several inspectors are dispatched to a mine at which there are special safety and health problems needing concentrated attention. Where more than one inspector is on the mine property at the same time, the inspectors frequently go to different areas of the mine, and for all practical purposes, they could be inspecting different mines.

"Under such circumstances, if representatives of miners are accompanying each inspector, one such representative accompanying each inspector is protected against loss of pay. If, regardless of the number of inspectors engaged in inspection activity at a mine, one and only one representative of miners were protected against loss of pay, an anomaly would result in that the decision to send several inspectors, rather than a single inspector, to a mine would adversely impact the protection against loss of pay, thereby eroding the participation right itself. The manner in which inspectors were assigned would thus determine the scope of a statutory right."

Insofar as the precise issue in this case is concerned, section 103(f) of the Act is not vague or ambiguous. It consists of five sentences which are examined separately below.

1. "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of Subsection (a) for the purpose of aiding such inspection and to participate in the pre- or post-inspection conferences held at the mine."

This sentence is preliminary and of general application. It requires that an authorized miner representative (singular) be given the opportunity (a) to accompany the "Secretary or his authorized representative"--not every given inspector--during the physical inspection of a mine, and (b) to participate in any conferences held before or after the inspection.

The phrases "the physical inspection" and "such inspection" refer to one inspection. The purpose of allowing accompaniment by operator and miner representatives is clearly specified as "aiding the inspection", not aiding the inspector. Furthermore, the

inspection referred to must be one "made pursuant to the provisions of subsection (a)." In my decision in another case of first impression, Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Docket No. PIKE 78-399, issued simultaneously herewith, I have concluded that the quoted clause was intended to be restrictive, and that during the legislative history of the Act, Congress clearly expressed its intent to limit accompaniment with no loss of pay to the regular "entire mine" inspections described in the third sentence of section 103(a).

2. "Where there is no authorized miner representative, the Secretary or his authorized miner representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine."

This second sentence applies only where there is no authorized miner representative (union) at the mine. In such a special situation, consultation by the Secretary, acting through an inspector, with a reasonable number of miners is required.

3. "Such representative of miners[6] who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection[7] made under this subsection."

This third sentence requires that the miner representative, whether appointed by a union, or otherwise selected where there is no union, if he is an employee,[8] shall be paid at his regular rate of pay for the period of time he participates in the inspection.[9]

4. "To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives."

This gives the Secretary, acting through an inspector, discretion to allow each party more than one representative to accompany him on the inspection (singular) provided the number is equal.

5. "However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss in pay during the period of such participation under the provisions of this subsection."

This expressly limits the pay provision to one miner representative/employee per inspection regardless of the number of inspectors conducting the inspection, and regardless of the number of operator's and miners' representatives accompanying them. The word "However," clearly links this provision with the preceding sentence and both should be read together. Thus, if the Secretary permits accompaniment by more than one representative, only one is entitled to suffer no loss of pay.

Congress could not have expressed the limitation of the "pay" provision of 103(f) more clearly. This is not some inadvertent ambiguity which has found its way into the statute. It is a strongly worded clear-cut restriction constituting an integral part of this new statutory provision first introduced into the mine safety scheme by the 1977 Act. While Congress sought to encourage miner participation in regular inspections, it also drew a distinct line as to how many

mine representative/employees would be paid for their time of participation in the inspection. Its plain meaning is that it provides inspection participation rights without loss of pay to one miner representative/employee per regular inspection--not per inspector. Contrary to MSHA's contention, I do not find this reading to result in an absurdity, nor am I inclined to follow MSHA's Interpretative Bulletin where it directly contradicts the Act. I have found the legislative history to be of little value in deciding this issue. In the parts thereof pointed to by the parties as support for thier positions, the Congressional source being quoted was not directly addressing the question with which we are concerned. To draw inferences favorable to one party or the other from some word or phrase idly dropped in the context of remarks directed to some other issue or subject matter is not warranted. This, indeed, is a case for applying the canon of construction of the wag who

said, when the legislative history is doubtful, go to the statute. March v. United States, 506 F.2d 1306, 1314 (D.C. Cir. 1974).

It is clear from the record that on July 26, 1978, the two inspectors were conducting but one regular inspection of the mine (mill). Applicant, by agreeing to pay one miners' representative for his participation therein was in compliance with section 103(f) of the Act. I find merit in the application.

IV. Conclusions of Law

Where a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different areas of the mine.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

The citation and order which are the subject of this proceeding are vacated.

Michael A. Lasher, Jr.
Judge

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FOOTNOTES

[1] 83 Stat. 742, 30 U.S.C. §801 et seq., herein the Act.

[2] Both the citation and order charge a violation of section 103(f) of the Act which provides:

> "(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequi-

site to the enforcement of any provision of this Act."

[3] The United Steelworkers of America, having failed to timely respond to the pre-hearing order issued October 17, 1978, was dropped as a party to the hearing (Tr. 3-9).

[4] Prior to March 9, 1978, the responsibility for regulating health and safety standards in the metal and nonmetal mining industry belonged to the Mining Enforcement and Safety Administration (MESA). Mine operators were issued mine identification numbers to identify the function which was being regulated (Tr. 46, 91). In large operations, MESA assigned separate numbers to parts of the operation which had an integrated function or operated in a functionally related manner (Tr. 47). I conclude that the mill and its related facilities covered by the same I.D. number are a mine as defined in section 102(b)(3) of the Act.

[5] This Interpretative Bulletin, which I find to be inconsistent with the governing legislation, insofar as it seeks to construe and implement the Act involved, is to be distinguished from legislative-type regulations duly promulgated in compliance with the rule-making provisions of the Administrative Procedure Act. Morton v. Ruiz, 415 U.S. 199, 39 L.Ed.2d 270, 94 S.Ct. 1055 (1974).

[6] Singular.

[7] Singular.

[8] By inference, a miners' representative can be selected who is not an employee.

[9] Since the word "inspection" used here is not qualified by the word "physical" as in the first sentence, I conclude that it includes both the physical inspection and the pre- and post-inspection conferences.

Appendix

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

81-1834

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

October, 1981 Term

MAGMA COPPER COMPANY, Petitioner, vs. SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, and FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION, Respondents, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Intervenor.	ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PETITION FOR WRIT OF CERTIORARI - APPENDIX "A" (Retyped)

APPENDIX "A"
DECISION OF NINTH CIRCUIT
COURT OF APPEALS

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CASE NO. _____

IN THE UNITED STATES SUPREME COURT

October, 1981 Term

MAGMA COPPER COMPANY, Petitioner, vs. SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, and FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION, Respondents, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Intervenor.	ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PETITION FOR WRIT OF CERTIORARI - APPENDIX "A" (Retyped)

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MAGMA COPPER COMPANY,
Petitioner,

v.

SECRETARY OF LABOR, Mine Safety and Health Administration, and Federal Mine Safety and Health Review Commission, Respondents,

United Steelworkers of America, AFL-CIO-CLC, Intervenor,

No. 79-7687.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 18, 1980.
Decided May 18, 1981.

The issue in this case is whether §103(f) of the Federal Mine Safety and Health Act of 1977, 30 USC §813(f), requires that, when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay if he is an employee of the mine operator. The Federal Mine Safety and Health Review Commission held that the Act does so provide, and we affirm.

I. Background.

The facts are not in dispute. Magma Copper Company ("Magma") operates a copper mine and mill in San Manuel, Arizona. The milling complex is large, including a receiving bin, a mine crusher, a mill crusher, a concentrator building, a molybdenum plant and a filter plant. One of these buildings is three stories tall and a quarter of a mile long, and the complex as a whole is spread out over an area of several miles. The milling complex is a "mine" subject to the Act. 30 USC §802(h).

On July 26, 1978, two inspectors from the Department of Labor arrived at the milling complex in order to continue an "entire mine" or "regular" inspection under §813(a) of the Act. The inspectors planned to split up, each of them inspecting a different part of the mill, adn they asked company officials to provide them with two miners' representatives to participate in the inspection. The company agreed to assign two

miners' representatives to the inspection, but took the position that §813(f) of the Act only requires that one miners' representative receive walkaround pay. Unwilling to ask a miners' representative to suffer loss of a day's wages, the inspectors went forward with the inspection with only one miners' representative. As they had planned, the inspectors formed two inspection parties and examined different - and geographically distant - sections of the milling complex.

Because of Magma's refusal to pay a second miners' representative for time spent accompanying an inspector, the inspectors issued a citation to Magma under §814(a). The citation was followed by a withdrawal order under §814(b). Magma contested the citation and withdrawal order, and the Administrative Law Judge, agreeing with Magma's interpretation of the Act, vacated the citation and order. The Federal Mine Safety and Health Review Commission ("Commission") reversed, holding that "one miners' represen-

tative in each inspection party must be paid for time spent accompanying an inspector . . . engaged in an inspection of the mine 'in its entirety' . . . ." The Commission reinstated the citation and withdrawal order and Magma petitioned this court for review.

II. The Merits.

Section 813(f) of the Act provides in pertinent part as follows:

> "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid in the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator

> shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. . . ."

The question here is whether the limitation in the final sentence quoted above - "However, only one such representative of miners . . . shall be entitled to suffer no loss of pay . . ." - means that when one inspector or one inspection party is accompanied by more than one miners' representative only one representative is entitled to walkaround pay, or whether it means that in all circumstances, even where there is more than one inspection party, only one miner shall be paid.

In an Interpretative Bulletin issued in April, 1978, 43 Fed.Reg. 17546 (April 25, 1978), some months before the inspection of the Magma facility, the Department of Labor stated its view that the limiting sentence applies only to the situation where one inspector or one inspection party is accompanied by more than one miners' representa-

tive. The Department reasoned that this is the natural way to interpret the limitation; the limiting sentence "directly follows a provision authorizing an inspector to allow more than one representative of miners to accompany him." Id. at 17549. The Department also said that to extend the limitation to a case in which "it is necessary to send several inspectors in order to most effectively or efficiently conduct inspection activity" Id. would be both illogical and contrary to the policies of the Act:

> ". . . the occasions when several inspectors are at a mine frequently include inspections of larger mines or mines with special problems requiring concentrated attention. It is precisely in those mines that participation by miners' representatives will ordinarily be most helpful. Moreover, the total time required to complete an inspection of a mine would be shorter if more inspectors are involved and they are inspecting different areas of the mine. Thus . . . the total outlay in wages . . . would be approximately the same, whether there is a single inspector accompanied by a single paid representative of miners for a longer period of time or several inspectors each accompanied by a paid representative of miners for a proportionately shorter period of time." Id.

Finally, the Department said that to restrict the right to walkaround pay because of the Department's decision to send an inspection team of several inspectors rather than a single inspector for a greater period of time, would be to sacrifice "the fundamental purpose" of §813(f) - "to encourage participation by miners in inspections through their representatives." Id. at 17548.

The Interpretative Bulletin states further that in situations where there are several inspectors who are proceeding together as a group on inspection activity, the limitation on the number of paid representatives would apply. "Only one representative accompanying the single group of inspectors would be entitled to suffer no loss of pay." Id. at 17549. Thus the bulletin restricts the ruling to cases in which there is more than one inspector, each carrying out a separate part of the inspection, so that the cost to the operator will usually be no more than if there were but one inspector who did the

whole job, accompanied by but one representative of miners.

The Commission concurred in the Department's interpretation of the section in light of the policies of the Act. We agree.

[1,2] At the outset, we note that the Department's interpretative bulletin "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." Whirlpool Corp. v. Marshall, 1980, 445 U.S. 1, 11, 100 S.Ct. 883, 890, 63 L.Ed.2d 154. Montana Power Co. v. EPA, 9 Cir., 1979, 608 F.2d 334, 344-345, 350; Cf. Irvington Moore, et al. v. Occupational Safety and Health Review Commission, 9 Cir., 1977, 556 F.2d 431, 434 ("Since in this case the Secretary's interpretation of his own regulations has been affirmed by the Commission, this interpretation must be accorded substantial weight.") We note also that "safety legislation is to be liberally construed to effectuate the congressional purpose", Whirlpool Corp., supra, 445 U.S. at

13, 100 S.Ct. at 891, and that "in cases involving conflict between rules of construction, the courts will strive to adopt that construction which best effectuates the legislative purpose." Reich v. Webb, 9 Cir., 1964, 336 F.2d 153, 157. See Brennan v. Keyser, 9 Cir., 1974, 507 F.2d 472, 477 ("Exceptions to humanitarian and remedial legislation must be narrowly construed.")

The language of the statute supports the Department's construction of it. It is not disputed that an inspector is the "authorized representative" of the Secretary. If we substitute "inspector" for "Secretary or his authorized representative", the statute, §813(f), will read:

> ". . . a representative authorized by [the operator's] miners shall be given an opportunity to accompany the [inspector] during the . . . inspection . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay. . . To the extent that the [inspector] determines that more than one representative of each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of

miners . . . shall be entitled to suffer no loss of pay. . . ."

Throughout the section the reference to the representative of the Secretary, i.e., the inspector, is in the singular. This language would support a construction that a representative of the miners is to accompany each inspector, and is not to suffer loss of pay. The sentence that says that "only one such representative . . . shall be entitled to suffer no loss of pay" refers back, by use of the phrase "such representative", to the preceding sentence, which provides that "the inspector may determine that more than one representative . . . would . . . aid the inspection", and authorizes "him", i.e., the inspector, to permit each party to have an equal number of representatives.

[3] Magma does not argue that the Secretary may not send more than one inspector to inspect, or that, having sent more than one, he must have all of them inspect together, rather than have each inspect a

different part of the mine. If the Secretary does send more than one, §813(f), read literally, will apply to each of them. This is the way that the bulletin applies the section, except in one respect. If more than one inspector do the inspection together, they are treated like one inspector for the purpose of §813(f). It can be persuasively argued that this limitation gives more relief to an operator than the section requires, but the limitation is eminently sensible.

Magma argues that §813(f) is ambiguous, and that the legislative history supports or even requires a construction of the "However . . . " sentence to forbid requiring walkaround pay to more than one employee during any inspection of the entire mine.

We agree with the Commission that the legislative history of §813(f) does not directly refer to the precise issue tha we face here. The only extended discussion of walkaround pay occurred in a colloquy between Senators Helms and Javits. Senator Helms

opposed the provision because of the expense to mine operators: "Some Companies, I am advised, have reported that there are as many as 5 inspectors in their mines at all times, and that . . . blitz inspections sometimes require 20 or more inspectors." Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d. Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (Committee Print July 1979) (hereinafter Legislative History) at 1053.

Speaking in response, Senator Javits argued that miner participation in inspections is essential to increased miner awareness of safety problems and that such participation could not be expected unless the miners were paid for their time. At the conclusion of these remarks he stated: "This bill only requires one miner to be compensated for the time he spends in accompanying the inspector. Other miners and company representatives may accompany inspectors and participate in the inspection. They may or

may not be paid by the operator, but we insist that one miner who accompanies the inspector should be paid, and there should be a provision that at least one miner should have that opportunity." Id. at 1055.

Magma argues that Senator Javits' concluding comments indicate his understanding that the provision of walkaround pay is limited to one miner regardless of the number of inspectors. It is by no means clear that that is so. The colloquy is equivocal. Senator Javits' comments can be understood to refer only to the situation where more than one miner accompanies a single inspector. Moreover, it is significant that Senator Javits did not flatly contradict Senator Helms' apparent understanding that where several inspectors are present, the measure provides that one representative of miners may accompany each inspector without loss of pay. As we have seen, the Interpretative Bulletin does not go so far. At best, this exchange leaves the issue in doubt.

The legislative history and the statute itself could not be clearer, however, as to the purposes of the legislation in general and of the walkaround pay provision in particular. As Senator Javits explained, the walkaround pay provision seeks to assure that miners will exercise their right to participate in inspections. The right of participation, in turn, attempts to increase miners' awareness of safety problems as well as to provide inspectors with a guide familiar with working conditions in the mine. Legislative History at 1054. See S.Rep.No. 95-181, 95th Cong., 1st Sess. at 28, reprinted in Legislative History at 616. The importance of miner participation in safety is repeatedly emphasized throughout the legislative history of the Act - "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." See S.Rep.No. 95-181, supra, at 35, reprinted in Legislative History at 623.

The walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners - the single overriding purpose of the legislation. The Senate Report explains that need for the legislation was demonstrated by a series of mining disasters, in particular the Scotia disaster in which 23 miners and 3 federal inspectors died from the explosion of accumulated methane gas. The committee staff report on the Scotia disaster found that one-man inspections of that mine had been ineffective. Indeed, the report found "evidence in the record to indicate that Scotia personnel, rather routinely, engaged in deceptive practices with respect to one-man . . . inspections. While an inspector was checking for adequate ventilation, for example, in one section of the mine, Scotia personnel were robbing air from another section to assure that the section being inspected was receiving adequate air supplies." Staff of House Comm. on Education and Labor, Subcomm. on

Labor Standards, 94th Cong., 2d Sess., Scotia Coal Mine Disaster (Comm. Print 1976) at 28-29.

Magma invites us to adopt an interpretation of the statute that would force the Department to choose between effective simultaneous inspections by several inspectors and the participation of miners in inspections. Under Magma's interpretation, in order to assure that one miner accompanies an inspector throughout the entire mine, the Department must risk the sort of hoodwinking that occurred, with tragic consequences, in the Scotia Mine. The clear outcome of such an interpretation is a reduction in safety when safety is the purpose of the legislation. And if safety is compromised on the one hand by Magma's interpretation, there is, on the other hand, simply no benefit gained by anyone. We agree with the Department's Interpretative Bulletin that the mine operator can be put to little if any additional expense by a comparatively quick inspection

by several inspectors each accompanied by one paid miners' representative as opposed to a far lengthier inspection by one inspector and one paid miner. In short, the interpretation urged by Magma makes little sense while it contravenes the basic purpose of the statute.

Finally, Magma's reliance on Leone v. Mobil Oil Corporation, D.C.Cir., 1975, 523 F.2d 1153, is misplaced. In that case the court held that neither the Occupational Safety and Health Act of 1970, 29 USC §651 et seq., nor the Fair Labor Standards Act, 29 USC §201 et seq., requires payment for the walkaround time of an employee representative. Unlike those two statutes, however, the Federal Mine Safety and Health Act specifically provides for walkaround pay. The statutes are not comparable and the Leone case is, therefore, simply irrelevant to the issue here.

We affirm the decision of the Commission.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-183

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAGMA COPPER COMPANY, PETITIONER

v.

SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. III) 813(f), requires that when two or more federal mine inspectors simultaneously conduct separate parts of an authorized mine inspection a miners' representative is entitled to accompany each inspector without suffering any loss of pay.

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MAGMA COPPER COMPANY, PETITIONER

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SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 645 F. 2d 694. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. B) is reported at 1 F.M.S.H.R.C. 1948 and at 1 M.S.H.C. (BNA) 2227.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1981, and a petition for rehearing was denied on June 22, 1981. The petition for a writ of certiorari was filed on July 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 26, 1978, two authorized representatives of the Secretary of Labor traveled to petitioner's San Manuel,

Arizona, copper mining complex to conduct an inspection pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. III) 801 *et seq.* The complex encompasses various operations and plants spread out over an area of several miles. In order to expedite the inspection, the inspectors planned to separate and each inspect a different portion of the mine. When the inspectors arrived at the mine, they requested, pursuant to Section 103(f) of the Act, 30 U.S.C. (Supp. III) 813(f), that a miners' representative accompany each of them on his inspection.[1] Petitioner's representatives agreed to assign two miners' representatives to the inspection, but stated that petitioner would not compensate more than one miners' representative for participation in the same inspection, even if the two representatives were accompanying different inspectors who were inspecting separate areas of the mine simultaneously. Because the inspectors were reluctant to ask a miner to forfeit a day's pay for participating in the inspection, only one inspector was accompanied by a miners' representative (Pet. App. A2154, B2-B3).

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[1]30 U.S.C. (Supp. III) 813(f) provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of

The inspectors issued a citation to petitioner based on its refusal to pay a second miners' representative for time spent accompanying an inspector. When petitioner failed to abate the violation within the time set in the citation, the inspectors issued a withdrawal order pursuant to 30 U.S.C. (Supp. III) 814(b). Because the order indicated that no specific area of the mine was affected, however, there was no physical withdrawal of miners (Pet. App. A2154, B4).[2] Pursuant to 30 U.S.C. (Supp. III) 815(d), petitioner sought review of the citation and order by the Federal Mine Safety and Health Review Commission.[3]

2. An administrative law judge vacated the citation and order (Pet. App. C), holding (*id.* at C15) that

> [w]here a single regular "entire mine" inspection is being conducted pursuant to section 103(a) of the Act by two or more inspectors, only one representative of miners is entitled to participate in the inspection without loss of pay even though the group conducting the inspection is divided into two or more parties to simultaneously inspect different areas of the mine.

The Secretary and the United Steelworkers of America petitioned the full Commission for review of the ALJ's

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> the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

[2]Section 104(a) of the Act, 30 U.S.C. (Supp. III) 814(a), requires an inspector to issue a citation "with reasonable promptness" when he believes that an operator has violated a provision of the Act or a mandatory health or safety standard. If the operator fails to abate the violation within the time allowed, an order will issue requiring the withdrawal of all miners from the area affected by the violation. 30 U.S.C. (Supp. III) 814(b).

[3]The Commission is an independent agency established to review citations and orders issued under the Act. 30 U.S.C. (Supp. III) 823.

order. See 30 U.S.C. (Supp. III) 823(d)(2). The Commission granted review and reversed (Pet. App. B).

The Commission found (Pet. App. B6) that the plain language of the statute does not address the question of the compensation of miners' representatives in situations where two or more inspectors simultaneously perform separate portions of a single inspection. Rather, the Commission found (*ibid.*), the statutory language "conveys the impression that Congress expected that one inspection party will visit all parts of the mine and one paid miners' representative will therefore fully participate in the inspection."

The Commission held (Pet. App. B6-B10), however, that the statutory scheme, together with its legislative history, requires that when two or more inspectors simultaneously conduct separate parts of an inspection, one miners' representative is entitled to accompany each inspector without suffering any loss of pay. The Commission found (*id.* at B7-B8) that the underlying purposes of Section 103(f), 30 U.S.C. (Supp. III) 813(f), are "to improve the thoroughness of mine inspections and the level of miner safety consciousness." It concluded (Pet. App. at B9) that to provide compensation to only one miners' representative when more than one inspection party is inspecting the mine simultaneously would frustrate these legislative purposes because miners would be discouraged from exercising their participation rights and because "the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners."

The Commission also noted (Pet. App. B6-B7) that the construction of the statute urged by petitioner would produce an illogical result, since, according to that construction, the right of miners' representatives to compensation would depend on the number of inspectors sent to the mine. By contrast, the Commission reasoned (*id.* at B9) that if the

Secretary "provid[es] a more efficient deployment of inspectors through multiple inspection parties, the Secretary should not be denied the assistance of the miner. Neither should the miner be denied the right to participate in such inspection without pay." Finally, the Commission noted its concurrence in "the Secretary's judgment that the cost to an operator of walkaround pay when two inspection parties are formed should roughly approximate the cost when only a single party is formed because the number of hours spent by paid miners' representatives in the inspection should be about the same in both cases" (*id.* at B7). Accordingly, the Commission concluded that when two or more inspectors simultaneously inspect separate areas of a single mine, the congressional purpose will best be effectuated by requiring the operator to compensate one miners' representative in each inspection party.

The court of appeals affirmed the Commission's decision (Pet. App. A), adopting the Secretary's Interpretative Bulletin construing the walkaround pay provision published at 43 Fed. Reg. 17546, 17549 (1978). The court held (Pet. App. A2156; emphasis in original) that the statutory language "support[s] a construction that a representative of the miners is to accompany *each* inspector" without loss of pay when two or more inspectors each head a separate investigation party. It reasoned (*id.* at A2158) that the Secretary's interpretation would further the important congressional purpose of encouraging miners to participate in inspections while putting a mine operator "to little if any additional expense" because there will be "a comparatively quick inspection by several inspectors each accompanied by one paid miners' representative as opposed to a far lengthier inspection by one inspector and one paid miner. In short, the interpretation urged by [petitioner] makes little sense while it contravenes the basic purpose of the statute."[4]

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[4]On August 21, 1981, Justice Rehnquist denied petitioner's application for a stay of the court of appeals' mandate.

ARGUMENT

The court of appeals correctly held that when two or more mine inspectors simultaneously conduct separate portions of an inspection authorized by Section 103(a) of the Act, 30 U.S.C. (Supp. III) 813(a), a miners' representative is entitled to accompany each inspector without suffering any loss in pay. The decision accords with both the statutory language and the legislative history of the Act and does not conflict with any decision of this Court or another court of appeals. Moreover, it affirms the interpretation of the Act promulgated by the Secretary, the official charged with administering the statute. Further review by this Court therefore is unwarranted.

As the court of appeals recognized (Pet. App. A2156, quoting *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980)), the Secretary's interpretation of a statute that he is charged with administering is " 'entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act.' " Where, as here, the Secretary's construction also has been affirmed by an administrative review commission, a party opposing that construction bears an even heavier burden. *Floyd, Etc.* v. *OSHRC*, 576 F. 2d 72, 75 n.4 (5th Cir. 1978); *Irvington Moore, Etc.* v. *OSHRC*, 556 F. 2d 431, 434 (9th Cir. 1977); *Clarkson Construction Co.* v. *OSHRC*, 531 F. 2d 451, 457 (10th Cir. 1976). Moreover, the statute involved in the present case is remedial safety legislation, which, as the court below recognized (Pet. App. A2156, quoting *Whirlpool Corp.* v. *Marshall, supra*, 445 U.S. at 13), must be " 'liberally construed to effectuate the congressional purpose.' "

Contrary to petitioner's contention (Pet. 18-24), the Secretary's construction of 30 U.S.C. (Supp. III) 813(f) is entirely consistent with the plain language of the Act. After providing that a representative of miners must "be given an opportunity to accompany the Secretary or his authorized

representative during the physical inspection of any * * * mine made pursuant to the provisions of subsection (a)," and may suffer no loss of pay because of such participation, Section 103(f) of the Act, 30 U.S.C. (Supp. III) 813(f), states:

> To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party [the miners and the operator] would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

Petitioner contends that the latter sentence means that where two or more inspectors simultaneously inspect different portions of a mine, only one inspector may be accompanied by a miners' representative who suffers no loss in pay. But as the Secretary, the Commission, and the court below each recognized, the sentence on which petitioner relies does not address the right of miners' representatives to compensation in an inspection conducted by multiple inspectors examining different parts of the mine, but concerns only the more common situation where two or more miners accompany a single inspector or inspection party. As the Secretary's Interpretative Bulletin remarks (43 Fed. Reg. 17549 (1978) (emphasis in original)):

> [t]he limitation is linked directly to the preceding sentence by the word "However," and affects only that sentence. Thus, where there is a single inspector, that inspector may allow more than one representative of miners to accompany him—*however*, only one such representative is entitled to suffer no loss of pay.

The Secretary's construction also effectuates most fully Congress' intent in enacting the statute. The legislative history of the Act demonstrates that Congress believed it was essential to the legislation's success that miners be encouraged to participate fully in inspections of the mines in which they worked. S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977). As a means of encouraging that participation, Congress linked the participation right to the right of miners to be compensated for their participation. The Senate Committee that drafted Section 103(f) stated (S. Rep. No. 95-181, *supra*, at 28-29):

> To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

Senator Javits, a manager of the bill that became the Act, explained the provision (123 Cong. Rec. 20019-20020 (1977)):

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.
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> * * * * *
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> [W]e cannot expect miners to engage in safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot

about mine safety, and that will be helpful to other employees and to the mine operator.

* * * * *

In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper. * * *

We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine.

* * * * *

It seems to me almost inconceivable that we could ask the individual to do that, as it were, on his own time rather than as an element in the operation of the whole enterprise.[5]

These excerpts from the legislative history make clear that Congress determined that increased participation by miners in inspections would improve both the thoroughness of mine inspections and the level of miners' safety consciousness. Both of these congressional objectives, however, would be frustrated by petitioner's narrow construction of 30 U.S.C. (Supp. III) 813(f).

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[5]Petitioner erroneously relies (Pet. 16) on Senator Javits' further statement (123 Cong. Rec. 20020 (1977)) that the "bill only requires one miner to be compensated for the time he spends in accompanying the inspector. Other miners and company representatives may accompany inspectors and participate in the inspection. They may or may not be paid by the operator, but we insist that one miner who accompanies the inspector should be paid, and there should be a provision that at least one miner should have that opportunity." Senator Javits, however, was responding to a proposed amendment that would have eliminated

Even if petitioner's and the Secretary's constructions of the statute were equally reasonable, the courts would be obliged to adopt that of the Secretary, since he is the official charged with the administration of the Act. See, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In fact, however, the construction urged by petitioner is not reasonable; it would produce illogical results. For example, in the present case, had the two inspectors visited the mine separately, on two successive days, rather than on the same day, petitioner presumably would not dispute that a miners' representative would have been allowed to accompany each inspector with no loss of pay. Yet, merely because the inspectors arrived at the mine on the same day, petitioner concludes that the miners' right to participate without loss of pay in the inspection is halved, even though, as the Secretary noted in his Interpretative Bulletin (43 Fed Reg. 17549 (1978)), an operator's "outlay in wages necessary to protect representatives of miners against loss of pay would be approximately the same, whether there is a single inspector accompanied by a single paid representative of miners for a longer period

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provision for any walkaround pay (see 123 Cong. Rec. 20019 (1977)). The context of Senator Javits' remarks makes clear that they were not directed to the situation where two or more inspectors simultaneously perform separate parts of a single inspection.

As petitioner itself points out (Pet. 12-15), the rest of the legislative history it cites (*ibid.*) does not even address the question of walkaround pay. In particular, petitioner's reliance (Pet. 12-13) on the testimony of Marco Vestick proves too much: it is clear from the plain language of 30 U.S.C. (Supp. III) 813(f) that more than one miners' representative must be permitted to accompany the inspector if the inspector "determines that more than one representative from each party would further aid the inspection * * *."

Petitioner also contends (Pet. 17, 24-27) that the Secretary failed to demonstrate that walkaround pay provides any incentive for miner participation in inspections. But, as the legislative history quoted in the text above demonstrates, this determination already has been made by Congress.

of time or several inspectors each accompanied by a paid representative of miners for a proportionately shorter period of time."

As the Secretary also noted in his Interpretative Bulletin (43 Fed. Reg. 17549 (1978)), several inspectors are frequently sent into mines that are too large to be inspected efficiently by a single inspector, or that have a history of significant health and safety problems.[6] If, however, the limitation on compensation to miners' representatives is interpreted as permitting payment for only one representative regardless of the number of inspectors or inspection parties in the mine, miners will be discouraged from fully participating in those very inspections in which thoroughness and miner awareness of problems are most acutely required.

Finally, petitioner's suggestion (Pet. 25-27) that the Secretary's determination that walkaround pay is not required by the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, should govern the rights of miners under the Federal Mine Safety and Health Act of 1977 is without merit. As this Court has recognized (*Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), slip op. 9), the Mine Act is specifically tailored to "industrial activity with a notorious history of serious accidents and unhealthful working conditions."

Because of the highly dangerous nature of the mining industry, the Mine Act explicitly provides miners with a number of rights that the OSH Act does not provide employees in other industries. One of the rights provided in the Mine Act is the right not to suffer any loss in pay

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[6]Petitioner does not challenge the Secretary's decision to send more than one inspection party to petitioner's mine.

because of time spent accompanying a federal mine inspector. The OSH Act contains no comparable provision requiring employers to compensate any of their employees for time spent accompanying federal inspectors. It was the OSH Act's silence on this issue that required the Secretary to exercise his discretion to determine whether that Act's purposes would be best served by the promulgation of a rule requiring such compensation. The Secretary, however, has no such discretion under the Mine Act. The Mine Act explicitly requires a mine operator to compensate one of its employees for time spent accompanying each federal mine inspector and requires the Secretary to enforce that obligation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

DOJ-1981-09